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Nos. 93-1408, 93-1414 and 93-1415

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

NEW YORK STATE CONFERENCE OF BLUE CROSS & BLUE SHIELD PLANS, *et al.*,
Petitioners,

v.

TRAVELERS INSURANCE CO., *et al.*,
Respondents.

MARIO M. CUOMO, GOVERNOR OF NEW YORK, *et al.*,
Petitioners,

v.

TRAVELERS INSURANCE CO., *et al.*,
Respondents.

HOSPITAL ASSOCIATION OF NEW YORK STATE,
Petitioner,

v.

TRAVELERS INSURANCE CO., *et al.*,
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals For The Second Circuit

BRIEF FOR NYSA-ILA WELFARE FUND, LOCAL NO. 807 LABOR-MANAGEMENT HEALTH FUND, DISTRICT COUNCIL OF IRON-WORKERS OF NORTHERN NEW JERSEY WELFARE FUND, SHEET METAL WORKERS LOCAL UNION NO. 25 WELFARE FUND, STEAMFITTERS WELFARE FUND, LOCAL UNION NO. 475, AND TRUCKING EMPLOYEES OF NORTH JERSEY WELFARE FUND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Interest of the *Amici Curiae*

The *amici curiae* are collectively-bargained employee welfare benefit plans covered by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.A. §§ 1001-1461 (West 1985 & Supp. 1994), that provide hospital and healthcare benefits to tens of thousands of unionized workers and their beneficiaries in various industries in New York and other Northeastern states. The *amici* and other ERISA plans are the intended beneficiaries of the congressional protections afforded by ERISA pre-emption. The *amici* thus have a vital and compelling interest in the ERISA pre-emption issue now before the Court. Indeed, one of the *amici* plans was induced to change its method of providing benefits as a direct result of the New York legislation.[1]

SUMMARY OF ARGUMENT

ERISA pre-empts state laws that relate to — *i.e.*, have a connection with — ERISA plans. Petitioners would have this court narrow this broad pre-emptive provision to exclude state laws of general application that have only an indirect, economic effect on ERISA plans. This revisionism is incompatible with the express language of ERISA, its underlying congressional purposes, its legislative history, and earlier decisions of this Court. A statute whose efficacy depends upon the forced participation of ERISA plans, whose operation involves the plans' essential function of administering benefits, and whose effect is to require ERISA plans to either change their method of providing benefits or spend up to 24% of their assets for the benefit of non-beneficiaries must relate to ERISA plans. Petitioners' requested retrenchment of ERISA's "relate to" standard must come from Congress, not this Court.

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[1] All parties have consented to the filing of this amicus brief. The parties' written consents have been lodged with the Clerk of the Court.

ARGUMENT

The Challenged New York Legislation Is Related To ERISA Plans And Thus Pre-empted

The state government, hospital industry, and Blue Cross interests which comprise Petitioners seek this Court's pruning of the most expansive pre-emption clause in history. ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any [ERISA-covered] employee benefit plan." 29 U.S.C.A. § 1144(a) (West 1985). [2]The plain and explicit language of ERISA's pre-emption clause as well as the historical record of its legislative passage reveal a clear and unambiguous congressional intent to preserve exclusive federal regulation in the field of employee benefit plans in order to achieve ERISA's legislative purposes.[3]

ERISA was promulgated principally to protect the interests of plan participants by assuring "the soundness and stability of plans with respect to adequate funds to pay promised benefits." 29 U.S.C.A. § 1001(a) (West 1985); *see Northeast Dep't IL-GWU Health & Welfare Fund v. Teamsters Local 229 Welfare*

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[2] Petitioners' attempt to salvage their case by invoking the insurance savings clause, 29 U.S.C.A. § 1144(b)(2)(A) (West 1985), should be rejected out of hand. On its face it is disingenuous to call the New York hospital rate-setting regime an insurance law when it applies to entities which are manifestly not in the business of insurance — self-insured funds, state and local governmental agencies, and even private uninsured individuals. *See* N.Y. PUB. HEALTH LAW § 2807-c (McKinney 1993).

[3] *See* 120 CONG. REC. 29,197 (1974) (statements of Rep. Dent.), *reprinted in* 3 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (Committee Print compiled by the Senate Subcommittee on Labor of the Senate Committee on Labor and Public Welfare) (hereinafter "ERISA LEGIS. HIST."), at 4670-71; 120 CONG. REC. 29,933 (1974) (statements of Sen Williams), *reprinted in* 3 ERISA LEGIS. HIST., AT 4745-46; 120 CONG. REC. 29,942 (1974) (statements of Sen. Javits), *reprinted in* 3 ERISA LEGIS. HIST., at 4770-71; S. REP. NO. 127, 93d Cong., 1st Sess. 35 (1973), *reprinted in* 1 ERISA LEGIS. HIST., at 621; H.R. REP. NO. 533, 93d Cong., 1st Sess. 12, 17 (1973), *reprinted in* 2 ERISA LEGIS. HIST., at 2359, 2364.

Fund, 764 F.2d 147, 163 (3d Cir. 1985) ("Resolution of the issue will affect not only the interests of beneficiaries, whose welfare it was the prime purpose of ERISA to protect, but also the interests of benefit trust funds, the solvency of which was a matter of serious congressional concern"); *see also Morgan Guar. Trust Co. v. Tax Appeals Tribunal*, 80 N.Y.2d 44, 48, 52, 587 N.Y.S.2d 252, 254, 257 (1992). To that end Congress adopted in ERISA "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans," *see* 29 U.S.C.A. § 1001(b) (West 1985), including the requirement that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C.A. § 1103(c)(1) (West Supp. 1994).[4]

This Court has articulated the controlling test for determining the meaning of "relate to": every state law that has a connection with or reference to an ERISA employee benefit plan relates to that plan and is pre-empted, whatever the state law's underlying purpose and intent. *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. __, 113 S. Ct. 580, 583 (1992); *FMC Corp. v. Holliday*, 498 U.S. 52, 58-59 (1990); *Shaw v. Delta Air Lines*, 463 U.S. 85, 96-97 (1983). The "relate to" standard must be given "a broad common sense meaning," *see Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990). This touchstone does not limit ERISA pre-emption only to state laws specifically designed to regulate the terms and conditions of employee benefit plans or those dealing with the subjects of

[4] This mandate reaffirms for all ERISA plans the identical "exclusive benefit" requirements enacted by Congress as far back as 1947 in the Taft-Hartley Act, *see* 29 U.S.C.A. § 186 (West 1978 & Supp. 1994), for joint labor-management plans created in collective bargaining. The "exclusive benefit" provisions prohibit the use of trust assets to benefit persons other than plan participants and their beneficiaries. *In re Typo-Publishers Outside Tape Fund*, 478 F.2d 374, 375-76 (2d Cir.), *cert. denied*, 414 U.S. 1002 (1973); *Blassie v. Kroger Co.*, 345 F.2d 58, 68 (8th Cir. 1965).

regulatory concern covered by ERISA — reporting, disclosure, fiduciary responsibility, and the like. *Ingersoll-Rand*, 498 U.S. at 137; *Shaw*, 463 U.S. at 98. Pre-emption prevails even if the state law is not specifically designed to affect ERISA plans or the state law's connection, reference, or effect is only indirect, *see Greater Wash. Bd. of Trade*, 113 S. Ct. at 583; *Ingersoll-Rand*, 498 U.S. at 139; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987), or the state law is "consistent with ERISA's substantive requirements," *see Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985).

The Second Circuit had no difficulty finding that a state law that cost ERISA plans in excess of $1.5 billion has a connection with those plans. Now Petitioners try to escape the self-evident by asking this Court to ignore the plain language of ERISA and redefine "relate to" so as to exclude from ERISA pre-emption any state law of general application that has an indirect, economic effect on ERISA plans. Petitioners' suggested revision is incompatible with the will of Congress.

State laws of general application do not enjoy a privileged position under ERISA.[5] The only mention of a law of general application appears in ERISA § 514(b)(4), which exempts from ERISA pre-emption "any generally applicable criminal law of a State." 29 U.S.C.A. § 1144(b)(4) (West 1985). No other generic law of general application is afforded special treatment.[6]

[5] In any event, the New York legislation, limited as it is to only a certain segment of society, hardly qualifies as a law of general application. *NYSA-ILA Medical & Clinical Serv. Fund v. Axelrod*, 27 F.3d 823, 827 (2d Cir.), *pet. for cert. pending*, No. 94-745 (U.S. filed Oct. 21, 1994).

[6] Because of the categorical application of ERISA's pre-emption clause to state laws of general application, only Congress can save specific state enactments from ERISA's pre-emptive reach. Hawaii's Prepaid Health Care Act, generally applicable to all employers in that state, would have been pre-empted by ERISA despite its status as a law of general application, were it not for an express congressional dispensation. *See* 29 U.S.C.A. § 1144(b)(5) (West 1985 & Supp. 1994); *see generally Retirement Fund Trust of Plumbing v. Franchise Tax Bd.*, 909 F.2d 1266, 1277-78 (9th Cir.

Indeed, state tax laws, which sweep broadly and usually apply to the entire taxpaying public, were explicitly singled out by Congress to assure that there would be no misunderstanding that they are subject to ERISA's express pre-emption clause, regardless of their general applicability. When ERISA was originally considered, Congress rejected a request by the Secretaries of Labor and Treasury to exclude state tax laws from ERISA pre-emption. *Northwest Airlines v. Roemer*, 603 F. Supp. 7, 12 (D. Minn. 1984). In 1983, when Congress amended ERISA to exclude Hawaii's healthcare regime from the pre-emption clause, it added a specific provision, 29 U.S.C.A. § 1144(b)(5)(B)(i) (West 1985), reaffirming that ERISA's pre-emption clause applied to state tax laws. *See* H.R. CONF. REP. No. 984, 97th Cong., 2d Sess. 18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4603.

1990) (explaining the legislative history of the special exception afforded Hawaii's healthcare legislation under ERISA). New York and other states which have either adopted healthcare legislation or are contemplating legislation in this area are well aware of the limits imposed by ERISA pre-emption. These states know exactly where to go for remedial relief. They have united in informal coalitions and *ad hoc* groups, which have adopted the strategy of each state petitioning Congress to enact a special waiver exempting that state's regulatory regime from the restrictions of ERISA pre-emption. *See Preemption: States, Employers Expect Battle Over ERISA Restrictions Next Year*, 21 Pens. & Benefits Rep. (BNA) 1838 (Sept. 26, 1994); *State Reform: States To Pressure Congress For ERISA Exemptions To Enact Reforms*, 21 Pens. & Benefits Rep. (BNA) 1867 (Oct. 3, 1994); *Preemption: ERISA Waivers Would Create Legal Nightmare, Attorney Says*, 21 Pens. & Benefits Rep. (BNA) 1983 (Oct. 10, 1994). While New York has put a gun to the heads of ERISA plans by obtaining special legislation amending the Internal Revenue Code to disallow tax deductions if plans do not pay the New York surcharges, *see* Omnibus Budget Reconciliation Act of 1993, PUB. L. No. 103-66, § 13442(a), 107 Stat. 568 (1993), amending 26 U.S.C.A. § 162(n) (West Supp. 1994), the campaign for ERISA waivers has not met with the same success. Recently, Congress did not enact the waiver sought by the State of Washington for its Health Services Act. *See Report Proposals: Washington To Pursue Reforms Despite Lack of ERISA Waiver*, 21 Pens. & Benefits Rep. (BNA) 1987 (Oct. 17, 1994).

Petitioners would limit pre-emption to laws that actually regulate the administration of ERISA plans or impede their interstate operations. *See* Brief For Petitioners Mario M. Cuomo, et al. at 10-11; Brief For The United States at 13. Under this construct state laws having purely economic effects on ERISA plans would not be pre-empted. In Petitioners' view statutes which regulate the administration of ERISA plans have a connection with them; statutes which could destroy them do not. Congress, however, did not share this view. It specifically refused to exempt from the pre-emptive sweep of ERISA state tax laws whose effect is purely economic.

Ultimately Petitioners' case relies upon the canard of characterizing the New York scheme as nothing more than honest hospital rate-setting, which only indirectly and incidentally raises the costs of healthcare purchased by ERISA plans. Petitioners equate the New York scheme with laws that regulate medical waste disposal, hospital staffing, utility rates, and other state regulation which results in increases in the cost of doing business. *See* Brief For Petitioners Mario M. Cuomo, et al. at 24-25; Brief For The United States at 13. That equation does not balance.

The New York scheme does not merely happen to ensnare the ERISA plans along with other healthcare purchasers. It cannot function effectively without the plans' enforced participation. This is manifest from petitioners' conduct in the litigation. They successfully sought a stay first from the district court and then from the court of appeals on the ground that the decision below by exempting ERISA plans from the surcharges would vitiate the whole system.

The exactions and regulations to which Petitioners attempt to liken the New York scheme affect ERISA plans as they do all others in society in their roles as employers, purchasers, and regulated businesses. The surcharges, however, which both the district and circuit courts found to be revenue-producing measures, *see* 813 F. Supp. at 1000; 14 F.3d at 713, affect ERISA

plans *qua* employee benefit plans; they exact their tribute from the very activities and functions that make employee benefit plans what they are — the provision of healthcare benefits.[7]

The difference between the New York scheme and legitimate state regulation that may increase costs is that the New York legislation's sole purpose — and the sole reason why it increases costs — is to provide benefits to persons not covered by ERISA plans. Neither the catchword "indirect" nor the concealment in the Byzantine disguise of a single section 80 pages long, *see* N.Y. PUB. HEALTH LAW § 2807-c (McKinney 1993), can obscure the true nature of the New York scheme. ERISA plans are being required either to spend almost a quarter of their assets to provide healthcare for strangers rather than for their beneficiaries or to change their method of administering and providing benefits. [8]To say that the law which mandates this result has no connection with ERISA plans is to defy reality.

Congress enacted in ERISA a deliberately broad preemption provision, which this Court has consistently refused to water down, that protects ERISA plans from rapacious state revenue-enhancing regulatory schemes. Petitioners ask this Court to dismantle the barrier that Congress has erected and let the feeding frenzy begin. Their request is as misdirected as it is mischievous. If congressional policy is to be revamped, recourse must be sought, as Petitioners well know, *see supra* note 6, in the halls of Congress, not in the chambers of this Court.

[7] This gives rise to a very practical consideration to be factored into the equation. In ERISA Congress encouraged management and labor to establish welfare plans for employees and their dependents. Employers and employees covered by ERISA plans will not passively sit by and continue to fund medical benefits for workers merely to permit states to siphon off the monies the contracting parties believed would be held in trust. Ironically, the indirect economic impact test advanced by Petitioners will cause the opposite of its intended effect by inducing collective-bargaining negotiators to reduce or eliminate employee welfare benefits in favor of wages or some other form of compensation that the workers can keep, thus aggravating the underlying healthcare crisis. As their past practices attest, employers and unions favor using available assets to create and fund welfare plans. In so doing they perform a real public service, consistent with the congressional purposes embodied in ERISA of fostering and encouraging these plans. But one cannot realistically expect these plans to accept the role of wet nurse to the rest of society.

[8] In 1992 *Amicus Curiae* NYSA-ILA Welfare Fund abandoned its traditional policy of self-insurance and contracted with Empire Blue Cross/Blue Shield in order to gain the advantage of the Blues' preferential exemption from the surcharges.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

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